Davis and Burton Contractors, Inc. *and* **Seigle Baisden.** Case 9-CA-15859

May 7, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On November 30, 1981, Administrative Law Judge James J. O'Meara, Jr., issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions, a supporting brief, and an answering brief to the General Counsel's cross-exceptions, and the General Counsel filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Davis and Burton Contractors, Inc., Catlettsburg, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Designate the existing paragraph under "1" as 1(a) and insert the following as paragraph 1(b):

"(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] As we are adopting the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) of the Act by refusing to recall Baisden from layoff because he engaged in protected concerted activity in picketing Respondent, we find it unnecessary to determine whether Baisden's complaining about Respondent's lateness in making fringe benefit payments was a further reason behind Respondent's discriminatory action.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT refuse to employ or reemploy any employee in retaliation for his, her, or their engagement in any protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the free choice of any of the rights set forth above.

WE WILL offer Seigle Baisden immediate and full reinstatement to his former job or, if such job no longer exists, to substantially equivalent position, without loss of seniority or any other rights or privileges previously enjoyed, and WE WILL make him whole, with interest, for any loss of earnings he may have suffered as a result of our refusal to reemploy him after a layoff on September 6, 1980.

DAVIS AND BURTON CONTRACTORS, INC.

DECISION

STATEMENT OF THE CASE

JAMES J. O'MEARA JR., Administrative Law Judge: The charge in this case was filed by Seigle Baisden on September 22, 1980. The complaint, issued on October 20, 1980, alleged that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by refusing to recall Baisden after a layoff because he had engaged in a strike protesting Respondent's issuance to him of a payroll check which was dishonored by Respondent's bank and because he had concertedly complained to Respondent regarding Respondent's failure to pay employee health and welfare benefit contributions in

a timely fashion. Respondent denies that it has violated the Act.

A hearing was held in Ashland, Kentucky, on June 10, 1981. At the close of the hearing, oral argument was waived. The parties were given leave to file briefs which have been received and considered.

Upon the record in this case, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent, Davis and Burton Contractors, Inc., is a Kentucky corporation which maintains an office and place of business in Catlettsburg, Kentucky. It is engaged in the construction and building business as a contractor in various States of the United States including the Commonwealth of Kentucky.

During a 12-month period immediately preceding the issuance of the subject complaint, it had, in the course of its business, purchased and received at its jobsites within Kentucky products, goods, and materials valued in excess of $50,000 directly from points located outside Kentucky.

I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it will effectuate the policies of the Act to assert jurisdiction in this case.

II. THE LABOR ORGANIZATION

International Association of Bridge, Structural and Ornamental Iron Workers, Local 769, AFL-CIO, is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

Statement of Facts

Respondent, in the course of its business, undertook a construction contract to remodel a steel mill at Kentucky Electric Steel. The prime contract terminated on September 6, 1980, after which Respondent was engaged on a "cost plus" day-to-day basis on the steel mill remodeling job. During the period Respondent employed between 2 and 160 employees at various stages of the work. Among the several trades so employed were union ironworkers among whom was the Charging Party, Seigle Baisden, a journeyman ironworker of 14 years' experience who was hired in March 1980 by Virgil Henshaw, Respondent's superintendent.[1]

On September 6, 1980, Baisden and 11 other ironworkers were laid off for economic reasons. During the course of Baisden's tenure with Respondent, he learned that certain payments by Respondent for employees' health and pension benefits were delinquent which caused him to be concerned that his health benefits would lapse. He complained on several occasions to Henshaw who expressed annoyance that Baisden had directed his complaints to him instead of to his union business agent.

Sometime in August, Baisden was notified by his bank that a recent payroll check from Respondent had been dishonored due to insufficient funds. The amount of the dishonored check had been deducted from Baisden's account at his bank and Baisden was concerned that he may have issued a "bad check" against this account. The evening of the day Baisden received notice of the dishonored payroll check he contacted Audrian Payne, a union steward, whom he told about the check and Respondent's delinquency in benefit payments. He also told Payne that he was going to set up a picket line at the construction site the next morning. Payne unsuccessfully attempted to reach Henshaw to advise him of Baisden's complaint.

At 6 o'clock the following morning, Baisden set up a "one-man" picket line at the main entrance to the jobsite. He displayed a sign which recited "No Pay—No Work." Other employees honored the picket line and the job was shut down that day. Respondent, upon learning of the picket line, met with Baisden and redeemed the dishonored check. Baisden demanded that Respondent also reimburse him for any bank charges arising from the transaction and, upon Respondent's initial refusal to do so, threatened to replace the picket line. Respondent acceded to Baisden's demand. Baisden removed the picket line but other employees who had honored the picket line had left the premises and the job remained shut down for the day. On the following morning Baisden returned to work and continued to work steadily until the September 6 layoff. Respondent took no disciplinary action against Baisden as a result of his strike action nor did it complain to, or take action against, the Union.

Of the 12 ironworkers laid off on September 6, 10 were called back between September 12 and 17; only Baisden and one J. Fields were not reemployed. Fields was recalled but chose not to accept the recall. On September 8, Respondent advised the Union by letter that it preferred "not to have" Baisden "sent to our job site at Kentucky Electric Steel at any later date." Henshaw testified that Baisden was not recalled because he was a "trouble-maker." Henshaw also characterized Baisden as a good worker and a competent ironworker able to perform all the tasks required of a journeyman ironworker. Henshaw stated that the reason for Baisden not being recalled was "mostly for the picket line sign that was put up at the gate, was the reason Baisden wasn't called back. The fact for not recalling Mr. Baisden was that he put up the picket line on the gate. That's the fact."

IV. DISCUSSION AND CONCLUSION

The General Counsel contends that the refusal of Respondent to reemploy Baisden because he set up a picket line violates Section 8(a)(1) of the Act. Respondent argues that Baisden's "strike" was in violation of the no-strike clause of the union contract and thus "unprotected activity," and also that Baisden's complaints about nonpayment of benefits should, under the contract, be pursued under the grievance procedures of the contract.

[1] Other ironworkers were employed upon the request of Respondent to the "union hall."

A. *The Picket Line*

Baisden's "one-man" picket line was, as acknowledged by the General Counsel, a violation of the no-strike clause of the contract. Such conduct does not fall within the protection of Section 7 of the Act. However, the action of Baisden was "condoned" by Respondent. Baisden negotiated with Respondent during the "strike" resolving the dispute with Respondent who reimbursed him for his monetary damages which arose from the dishonor of Respondent's paycheck. This, apparently, and according to Henshaw, "settled the matter." Baisden returned to work the next day and continued to work until the layoff of September 6. No disciplinary action was carried out nor threatened by Respondent. The fact that Baisden's picket sign "No Pay—No Work" was honored by fellow employees clearly makes the activity of Baisden "concerted."[2]

Condonation in such circumstances is a question of fact to be determined by, *inter alia*, the conduct of the parties. The failure of Respondent to take any disciplinary action against Baisden for his picket line which caused the jobsite to be shut down for a day and his continued employment until the September 6 layoff are evidence that Respondent had condoned whatever unlawful aspects tainted Baisden's "picket line." It is reasonable to conclude that Respondent had placed Baisden in the position which prompted him to take his action against Respondent. It had issued a payroll check on an account with insufficient funds. It is reasonable to conclude, and I so conclude, that the default of Respondent prompted its quick settlement with Baisden and its continuing to employ him. I conclude from the foregoing that Respondent did, in fact, condone the activity of Baisden.

The Board has held in *Richardson Paint Company, Inc.* v. *N.L.R.B.*, 574 F.2d 1195, 1202–3 (5th Cir. 1978):

> Under the doctrine of condonation, the employer may not . . . assert the unlawful aspect of the employees' actions as grounds for subsequent discharge or discipline. *Jones & McKnight, Inc.* v. *N.L.R.B.*, 445 F.2d 97, 102 (7th Cir. 1971). "The doctrine prohibits an employer from misleadingly agreeing to return its employees to work and then taking disciplinary action for something apparently forgiven." . . . With the employer's voluntary forgiveness of the unprotected aspect of the employees' concerted activity, this activity assumes a protected status.

It is clear on the facts of this case that the Company forgave the unprotected aspect of the acts of Baisden who breached the no-strike provision of the collective-bargaining agreement by walking off the job and picketing. Respondent allowed this employee to return to work and took no reprisals; thus, under the doctrine of condonation, the walkout assumed protected status and any reprisal would be illegal.

Accordingly, the refusal to recall Baisden, as it did the other similarly situated employees, for the express reason that he had set up a picket line, violates Section 8(a)(1) of the Act.

B. *Baisden's Complaints Regarding Benefit Payments*

Since I have found that Respondent's refusal to rehire Baisden because he engaged in unprotected, but condoned, activity violates Section 8(a)(1) of the Act and that such engagement was the reason for his nonrecall, it follows, and I find, that Baisden's complaints to Respondent about its delinquency in benefit payments to the Union did not comprise the reason, nor a part thereof, for Respondent's action. If it were not for Baisden's "picket line" he would have been recalled. He was an admittedly qualified ironworker and Henshaw candidly acknowledged that he was not recalled, "because he set up the picket line on the gate."

C. *The Respondent-Union Contract*

Respondent argues that the provisions of the contract permit the employer to determine who should be employed and laid off and that it shall have the right to reject any applicant referred by the local Union. Such argument has no merit when the provisions of the contract are construed to allow illegal activity. To interpret the contract as Respondent would have it interpreted would permit the terms of the contract to vitiate the provisions of the Act. While the employer in this circumstance has the right to employ whomever it wishes, it does not have the right to discriminate in such employment against one who has exercised rights guaranteed him under the provisions of the Act. In this case it is clear that Baisden's unlawful concerted activity was condoned by Respondent and his refusal to rehire Baisden for the admitted reason that Baisden engaged in such activity is a clear violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and the Union is a labor organization within the meaning of the Act.
2. Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act by refusing to recall Seigle Baisden after his having been laid off because of his engagement in a protected activity.
3. The aforecited practice is an unfair labor practice affecting commerce within the meaning of the Act.

THE REMEDY

Having found that Respondent engaged in certain unfair labor practices, it shall be ordered that it cease and desist therefrom or from engaging in any similar or related conduct and that it take certain affirmative action to effectuate the policies of the Act.

Upon the foregoing findings of fact, conclusions of law, and the record in this case, and pursuant to Section 10(c) of the Act, I hereby recommend the following:

[2] One other employee also experienced a dishonored payroll check issued by Respondent.

ORDER[3]

The Respondent, Davis and Burton Contractors, Inc., Catlettsburg, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from refusing to employ or reemploy an employee because of the employee's engagement in protected concerted activity.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer to Seigle Baisden immediate and full reinstatement of his former job or, if that position no longer exists, to a substantially equivalent position of employment, without prejudice to the seniority and/or other rights and privileges enjoyed by such employee and to make the said Seigle Baisden whole in accordance with the formula prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest, as set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), for loss of pay and other benefits lost by reason of Respondent's unlawful refusal to recall said employee.

(b) Preserve and, upon request, make available to the Board or to its agents, for examination and copying, all payroll records, social security records, timecards, personnel reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post in a conspicuous place at its jobsite located at Kentucky Electric Steel Company copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[3] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."